IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5606 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ILABEN D/O MAYABHAI MEHTA & W/O RAVINDRABHAI SHAH

Versus

INDIAN BANK

Appearance:

1. Special Civil Application No. 5606 of 2000

MR MB GANDHI for Petitioner No. 1

MRS TRUSHA M GANDHI for Petitioner No. 1

MR DHARMESH V SHAH for Respondent No. 1

..... for Respondent No. 2

MR HR LATHIGARA for Respondent No. 2/1-2/8

MR MANISH R BHATT for Respondent No. 3

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 12/09/2000

ORAL JUDGEMENT

Rule. With the consent of the learned advocates for the parties, the matter is taken up for hearing today.

2. Illaben daughter of Mayabhai Mehta and wife of Ravindrabhai Shah has filed this petition challenging the order dated 06.04.2000 passed by the Debts recovery Tribunal, Ahmedabad in Original Application No.14 of 1997, rejecting the application filed by the present petitioner to restrain the respondent Bank from disposing of the property in question being Bungalow No.1, Gyandip Co-operative Housing Society, Dhumketu Road, Paldi, Ahmedabad.

3. It appears that the brothers of the petitioner had taken a loan from respondent No.1 - Bank (the respondent - Bank) and petitioner's mother had stood as a guarantor to repay the said loan amount and for that purpose the mother of the petitioner had mortgaged the aforesaid residential bungalow. Since the amount was not repaid as per the agreement, the Bank filed an application for recovery of the said loan amount before the Debts Recovery Tribunal, Ahmedabad. In the said proceedings the petitioner filed an application before the Debts Recovery Tribunal contending that she has 1/4th share in the property originally belonging to her father, who expired on 06.09.1984 leaving behind him widow Prabhavatiben M. Mehta (mother of the petitioner), present petitioner - Illaben (daughter) and two sons namely Mukeshbhai and Kaushikbhai. The petitioner, therefore, claimed 1/4th share in the said bungalow. The petitioner has also filed a Civil Suit No.5180 of 1992 in the City Civil Court, Ahmedabad for a declaration and permanent injunction for 1/4th share in the said property. The petitioner has also filed an application Ex.6 in the said Suit and the City Civil court, Ahmedabad has granted ad-interim injunction restraining the other heirs of Mayachand M. Mehta from disposing of the aforesaid bungalow.

4. Before the D.R.T., the petitioner contended that in view of the aforesaid facts, the petitioner is required to be heard and that the Tribunal may not pass any order. That application came to be dismissed by the Tribunal by the impugned order on the ground that in the record of the Co-operative Society, the said bungalow stands in the name of the mother of the petitioner and the mother had mortgaged the property by depositing title deeds of the property with the respondent - Bank for the

purpose of guaranteeing repayment of loan and, therefore, the petitioner's claim cannot be considered.

5. While issuing notice, this Court had passed the following ad-interim order on 19.06.2000 :-

"Notice for final disposal returnable on 10.07.2000. In the meantime, while there is no ad-interim injunction against auction of the property in question (Bungalow No.1, Gnandeep Society, Paldi) it is directed that respondent No.1 Bank shall not appropriate 1/4th portion of the sale consideration which may be received for the aforesaid property towards its dues till then. D.S. Permitted."

6. In response to the notice, affidavit-in-reply is filed on behalf of the respondent - Bank contending interalia that the petitioner has an equally efficacious alternative remedy of appeal under Section 20 of the Recovery of Debts due to the Banks & Financial Institutions Act, 1993.

It is further contended that the property in question stands in the name of respondent No.2/6 (the mother of the petitioner) since 30.06.1986 as absolute owner and an as absolute owner of said property, the respondent No.2/6 has mortgaged the said property with the respondent Bank. It is further contended that for the reason best known to the petitioner, the petitioner has allowed the said property to be transferred in the name of respondent No.6 in 1986 and, therefore, the petitioner is now estopped from claiming any right against the said mortgage or against the respondent Bank.

7. The learned advocate for the respondent - Bank has relied upon the following decisions :-

[1] Titaghur Paper Mills Co. Ltd. and another Vs. State of Orissa and another, reported in AIR 1983 S.C. 603.

[2] L.P.A. No.273 of 1997 dated 17.10.1997 of this Court [Coram : C.K.Thakkar and Miss. R.M.Doshit, JJ.].

8. There can be no dispute about the principles laid down in the aforesaid decisions that ordinarily, when a statutory remedy is available to an aggrieved party, this Court would not exercise extra ordinary powers under Art. 226 and/or 227 of the Constitution of India and the Court

should require the party first to avail of that remedy. However, considering the fact that this Court proposes to protect the interests of the parties during pendency of the litigation before the City Civil Court, Ahmedabad without in the least causing any detriment to the respondent - Bank, the self imposed bar of alternative remedy does not whittle down the powers of this Court under Art.226 of the Constitution of India.

9. Having considered the averments and pleadings of the parties and having heard Mr.M.B.Gandhi, learned counsel for the petitioner, Mr.D.V.Shah, learned counsel for respondent No.1 - Bank and Mr.H.R. Lathigara, learned advocate for the respondent Nos. 2/1 to 2/8, it appears to the Court that since the Court does not propose to restrain the respondent - Bank from proceeding with the application pending before the Tribunal, nor to grant any injunction against the respondent - Bank from proceeding against the property in question i.e. the aforesaid bungalow and also considering the pendency of the above suit before the City Civil Court, Ahmedabad, the Court is not inclined to throw out this petition only on the ground of availability of alternative remedy. Since the Civil Suit is pending before the City Civil Court, Ahmedabad since 1992, it cannot be said that the application of the petitioner before the D.R.T. is required to be dismissed only on the ground of delay. At the same time, the Bank is not required to be restrained from proceeding against the said property till the decision of the aforesaid suit, but at the highest the respondent - Bank is required to be restrained from appropriating an amount equal to 1/4th of the sale consideration of the property in question against its dues. Since the decision in the aforesaid suit may cause prejudice to the respondent - Bank and since the respondent Bank is required to be posted with the developments in the aforesaid suit i.e. Civil Suit No.5180 of 1992 Mr.Gandhi, learned counsel for the petitioner fairly states that he has no objection, if the respondent Bank is joined as a party respondent in the above suit.

10. In view of the above discussion, the following order is passed :-

The impugned order dated 06.04.2000 passed by the Debts Recovery Tribunal, Ahmedabad, in original Application No.14 of 1997 is hereby quashed and set aside. The petitioner shall be joined as a party respondent in Original Application No.14 of 1997. The respondent - Bank shall be joined as a party respondent

in Civil Suit No.5180 of 1992 pending before the City Civil Court at Ahmedabad. In case the respondent Bank succeeds in the application before the Debts Recovery Tribunal for recovery of its dues and in the execution proceedings the property in question (being Bungalow No.1, Gyandip Co-operative Housing Society, Dhumketu Road, Paldi, Ahmedabad) is required to be sold, the respondent - Bank shall not appropriate an amount equal to 1/4th share of the sale consideration of the said property till the final disposal of the said suit and after disposal of the said suit, the respondent Bank shall be entitled to proceed in respect of the said 1/4th amount, after giving opportunity of being heard to the parties. The City Civil Court, Ahmedabad shall also hear and decide Civil Suit No.5180 of 1992 as expeditiously as possible.

The petition stands disposed of in terms of the aforesaid directions. Rule is made absolute to the aforesaid extent. No order as to costs.

[M.S.SHAH,J.]

vrp